



Federal Communications Commission
Washington, D.C. 20554

July 23, 2003
DA 03-2406

Jorge J. Inga, M.D.
Rafael Blanco, M.D.
Pan American Interactive Corporation
6701 Hanley Road
Tampa, FL 33634

Re: Pan American Interactive Corporation's Request for Postponement of Installment Payment Due Dates

Dear Messrs. Inga and Blanco:

This letter responds to the two requests¹ filed on behalf of Pan American Interactive Corporation ("Pan American") seeking a grant of an eighteen month postponement of the Federal Communications Commission's ("Commission") installment payment deadline for a license in the 218-219 MHz Service (formerly the Interactive Video and Data Service).² For the reasons set forth below, we treat these filings as requests for waiver of the Commission's installment payment rules and deny Pan American's request.

1. Background

Pan American was the high bidder on one license in the Interactive Video Data Service auction ("Auction No. 2"), which concluded on July 29, 1994.³ As a small business, Pan American was eligible to participate in the Commission's installment payment plan.⁴ Grant of the license IVM012B, was conditioned upon Pan American's full and timely performance of its payment obligations.⁵ On September 10, 1999, the Commission issued the *218-219 MHz Order*, which modified the regulations governing the licensing of this service.⁶ The *218-219 MHz Order*, among other measures, adopted a financial restructuring plan for "Eligible Licensees."⁷ Eligible Licensees could choose between (i)

¹ Letter from Jorge J. Inga and Rafael Blanco to Rita Cookmeyer, dated April 9, 2002 ("Waiver Request"); Letter from Jorge J. Inga and Rafael Blanco to Michael Powell, Chairman, Federal Communications Commission, dated November 19, 2002 ("Supplement").

² Pan American is the licensee for license IVM012B, the Fort Lauderdale-Miami MSA.

³ "Interactive Video and Data Service (IVDS) Applications Accepted for Filing," *Public Notice*, 9 FCC Rcd 6227 (1994).

⁴ 47 C.F.R. § 1.2110(e) (1995).

⁵ 47 C.F.R. § 1.2110(e)(4) (1995).

⁶ Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497 (2000) ("*218-219 MHz Order*"); Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Order on Reconsideration*, 14 FCC Rcd 21078 (1999) ("*218-219 MHz Recon Order*").

⁷ *218-219 MHz Order* 15 FCC Rcd at 1499-1500, ¶ 4. Eligible Licensees are licensees that: (i) were current in installment payments as of March 16, 1998; (ii) were less than ninety days delinquent on the last payment due

reamortization of principal and interest installment payments over the remaining term of the license (“resumption option”); (ii) an amnesty option, in which Eligible Licensees could have all of the outstanding debt forgiven on any of the licenses that they chose to surrender to the Commission for reacuation; or (iii) license prepayment, in which Eligible Licensees could retain or return as many licenses as they desired, as long as the licensees prepaid the outstanding principal owed for the retained licenses.⁸ Each Eligible Licensee was obligated to make its election by the Election Date.⁹

The Election Date was established as the last business day of the first full month after the Commission released the *218-219 MHz Reconsideration Order*.¹⁰ The Commission also indicated that for those that elected resumption, the first quarterly installment payment was due at the end of the third month after the Election Date.¹¹ Thereafter, additional installment payments were due every quarter for the remaining years of the 10 year term of the license. The licensees electing resumption were also subject to the Commission’s installment payment rules that allow a licensee to use up to two quarterly grace periods, subject to late payment fees, if the licensees require additional time to submit an installment payment.¹² Failure to make payment in accordance with the Commission’s rules results in an automatic cancellation of a license without further action by the Commission.¹³

On January 3, 2001, the Commission released its *Revised Election Date PN*, in which the Commission announced that Eligible Licensees were required to make an election on or before January 31, 2001.¹⁴ Pan American, as an Eligible Licensee, chose to forgo the opportunity to obtain amnesty, and instead, selected the payment resumption option.¹⁵

before March 16, 1998; or (iii) had properly filed grace period requests under the former installment payment rule. *Id.*, 15 FCC Rcd at 1519-1529, ¶¶ 34-53.

⁸ *Id.*

⁹ *Id.*, at 1529, ¶ 54.

¹⁰ Implementation Procedures for the Report and Order and Memorandum Opinion and Order Addressing the 218-219 MHz Services (Formerly Known as Interactive Video and Data Services (IVDS)) *Public Notice*, 15 FCC Rcd 7329, 7330-31 (2000) (WTB) (“*Implementation PN*”).

¹¹ *218-219 MHz Order*, 15 FCC Rcd at 1523-24, ¶¶ 43-44; *Implementation PN*, 15 FCC Rcd at 7333.

¹² 47 C.F.R. § 1.2110(g)(4)(i)-(ii).

¹³ *Id.*

¹⁴ Federal Communications Commission Announces Change to The Election Date For 218-219 MHz Service, *Public Notice*, 16 FCC Rcd 4007 (2001); Wireless Telecommunications Bureau Announces Revised Election Date (January 31, 2001) and Amended Eligibility List For 218-219 MHz Service, *Public Notice*, DA 01-009 (rel. January 3, 2001) (WTB) (“*Revised Election Date PN*”).

¹⁵ *Implementation PN*, 15 FCC Rcd at 7333.

2. Discussion

Despite the financial restructuring that the Commission previously provided for all eligible licensees in the 218-219 MHz Service, Pan American now seeks an additional eighteen-month postponement of its installment payment obligations. Pan American argues that the current financial market has hampered its ability to raise sufficient funds to both continue technological development of its service and make installment payments.¹⁶ In the alternative, Pan American requests that the Commission waive the principal associated with its installment payment obligations and seeks to pay only the interest due on the payment.¹⁷

To obtain a waiver of the Commission's installment payment rule, Pan American must show that: (i) the underlying purpose of the rule would not be served or would be frustrated by application in this particular case, and that grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of this particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that Pan American has no reasonable alternative.¹⁸ For the reasons discussed below, we find that Pan American's requests fail to meet the Commission's standard for granting a waiver.

In adopting the restructuring plan in the 218-219 MHz Service, the Commission balanced the need to serve the public interest by affording relief to licensees with its duty to preserve the integrity of the auction process.¹⁹ The Commission recognized that the options adopted might not suit every licensee's particular business plan.²⁰ In so doing, the Commission specifically found that the resumption option, coupled with the grace period rules, would provide relief for licensees that wished to retain their licenses but were experiencing financial hardship.²¹ Requiring that licensees fulfill their payment obligations under the installment payment rules and thereby demonstrate their ability to pay as a condition to holding licenses ensures a fair and efficient licensing process.²² It is also fair to participants in the

¹⁶ Waiver Request at 1.

¹⁷ Supplement at 2.

¹⁸ 47 C.F.R. § 1.925.

¹⁹ *218-219 MHz Order*, 15 FCC Rcd at 1499, ¶ 2 and 1520, ¶¶ 37-38; *see* Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 25020, 25027, ¶ 12 (2000) ("*Second Order on Recon*").

²⁰ *Second Order on Recon*, 15 FCC Rcd at 25029, ¶ 19 (the Commission discussed the purpose and impact of the restructuring plan in rejecting a disaggregation option).

²¹ *218-219 MHz Order*, 15 FCC Rcd at 1524, ¶ 44.

²² *See* Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, Petition for Reconsideration, *Memorandum Opinion and Order*, FCC 00-434, 15 FCC Rcd 25113 (2000); Southern Communications Systems, Inc. Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block Licenses in the Cleveland, TN BTA, *Memorandum Opinion & Order*, 15 FCC Rcd 25103, 25106, ¶ 7 (2000) ("*Southern Communications MO&O*"); *see also* In the Matter of Amendment of Part 1 of the Commission's Rules, Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use 4660-4685 MHz, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 429-30, ¶¶ 95-96 (1998); Letter to E. Ashton Johnston, Esq., Counsel for Vista

original auction, to those who made elections based upon the restructuring options, and to licensees in other services that are also subject to the installment payment rules.²³

The Commission's rules for installment payments provide licensees experiencing financial difficulties a substantial amount of time within which to pursue private market solutions to their financial difficulties.²⁴ The Commission adopted these provisions for "extraordinary circumstances – instances of financial distress – for which temporary relief is appropriate."²⁵ The Commission has recognized that although there is considerable flexibility in its payment rules, "it is inevitable that some licensees will seek more time to pay," and, in this respect, the Commission's rules cannot accommodate every licensee's business plans.²⁶ In light of both the restructuring previously provided in the 218-219 MHz Service as well as the flexibility already present in the installment payment rules, to now allow Pan American additional time in which to make its payments would only serve to undermine the purpose behind enforcement of the Commission's payment deadlines.²⁷ Accordingly, we find that Pan American has failed to demonstrate that the rule's purpose would not be served, or that it would be frustrated, by applying it to Pan American, and that Pan American has failed to show that grant of an additional eighteen months to make its installment payment would be in the public interest.

Pan American's arguments concerning the facts and circumstances of its particular case are not unique and do not change our analysis. Pan American's contention that a decline in the financial markets, including its failure to form a joint venture agreement with another party, decreased its ability to fund the

Communications, Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd 12430 (2001) ("*Vista*"); Letter to J. Jeffrey Craven, Esq., Counsel for IVIDCO, L.L.C., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd 7236 (2001) ("*Ividco*").

²³ See *Vista*, 16 FCC Rcd 12430; *Ividco*, 16 FCC Rcd 7236; *Southern Communication MO&O*, 15 FCC Rcd at 25106, ¶ 7.

²⁴ Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket 97-82, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 439-440, ¶ 110 (1997) ("*Part 1 Third Report and Order*"); see also *Southern MO&O*, 15 FCC Rcd at 25110, ¶ 15.

²⁵ Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15304-05, ¶ 19 (2000) ("*Part 1 Order on Recon of Third Report and Order*"); *Part 1 Third Report and Order*, 13 FCC Rcd at 440, ¶ 110.

²⁶ Amendment of the Commission's Rules Regarding Installment Financing for Personal Communications Services ("PCS") Licensees, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8354 at ¶ 24 (1997) ("No matter what deadline we establish, it is inevitable that some licensees will seek more time to pay."); see also *Southern Communications MO&O*, 15 FCC Rcd at 25110, ¶ 15; *New England Mobile Letter*, 16 FCC Rcd at 19357-58 (noting that the Commission's payment rules cannot accommodate every business plan).

²⁷ *Southern Communications MO&O*, 15 FCC Rcd at 25111, ¶ 15; Letter to Mr. Kurt Schueler, President, New England Mobile Communications, Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 01-2542 (rel. October 30, 2001) ("*New England Mobile*"); Letter to J. Curtis Henderson, Esq., Senior Vice President & General Counsel, Nucentrix Broadband Networks, Inc. and Peter D. Shields, Esq., Wiley, Rein & Fielding, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 17 FCC Rcd 559, 561 (2002).

operation and development of its system and to make installment payments,²⁸ while unfortunate, is not a unique fact or circumstance that meets the waiver standard.²⁹ Pan American had full notice of both the specific terms of the 218-219 MHz Service financial restructuring and our general installment payment rules. In choosing to both become and to remain a licensee, Pan American accepted the risk that its assumptions regarding the availability of capital might be incorrect.³⁰ Correspondingly, Pan American is responsible for the consequences that flow from its business decisions to acquire the license at issue. Thus, Pan American's speculation that market conditions will improve and that it will be attractive to potential investors is not an adequate basis for a grant of a waiver request.

Under the restructuring options offered in the *218-219 MHz Order*, Pan American had the opportunity to return its 218-219 MHz license and receive amnesty on the outstanding amount of its debt obligation.³¹ However, with full notice of the elements of the Commission's restructuring options, Pan American elected resumption on January 29, 2001³² and is now precluded from opting out of its election.³³ If Pan American subsequently found, as a result of a business arrangement gone awry, that it lacked sufficient resources to both pay for and build out its license, Pan American nonetheless bore that risk when it made its election. These are not unique circumstances sufficient to justify waiver of our late payment rules.³⁴ Accordingly, Pan American's request is denied.

²⁸ Waiver Request at 1.

²⁹ *New England Mobile*, 16 FCC Rcd 19355 (2001) (holding that a 218-219 MHz licensee's inability to raise sufficient capital to build out and pay for licenses does not justify waiver of the payment rules particularly when the licensee assumed such risks in electing the resumption option); *see also Southern Communication MO&O*, 15 FCC Rcd at 25107, ¶ 10 (holding that a failure to appropriately manage business arrangements does not justify waiver of the automatic cancellation rule).

³⁰ *New England Mobile*, 16 FCC Rcd at 19358.

³¹ Pan American's request, which is in essence an untimely request to reconsider the payment restructuring options, was submitted on April 9, 2002, significantly past the adoption of the *218-219 MHz Order*, the Election Date, and the first quarterly installment payment due date. The *218-219 MHz Order* was adopted on September 7, 1999. *218-219 MHz Order*, 15 FCC Rcd at 1497. In the *218-219 MHz NPRM*, the Commission sought comment on its proposal to permit reamortization of principal and interest installment payments for non-defaulted 218-219 MHz licenses. Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services, *Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 19064, 19085-87, ¶¶ 37-39 (1998) ("*218-219 MHz NPRM*"). Pan American had the opportunity to participate in the restructuring of the service by commenting on the reamortization of principal and interest payments but opted not to do so. *See 218-219 MHz Order*, 15 FCC Rcd at 1565-66, Appendix A, Lists of Commenters and Reply Commenters; *see also, Second Order on Recon*, 15 FCC Rcd at 25045, Appendix A, List of Petitioners. Eligible Licensees were required to make their elections by January 31, 2001. *Election Public Notice*, 16 FCC Rcd at 5938.

³² Pan American's Election for Reamortization/Resumption of Payments under the installment payment plan, dated January 29, 2001.

³³ *See Election Public Notice*, 16 FCC Rcd at 5937-38 ("Accordingly, Eligible Licensees must make their elections by 7 p.m., Wednesday, January 31, 2001. **NO ELECTIONS OR CHANGES TO ELECTIONS WILL BE ACCEPTED AFTER 7 P.M. ON THE ELECTION DATE.**") (no emphasis added).

³⁴ *See also Southern Communications MO&O*, 15 FCC Rcd at 25107, ¶ 10 (holding that a failure to appropriately manage business arrangements does not justify waiver of the automatic cancellation rule); BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, 12 FCC

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Accordingly, IT IS ORDERED that, Pan American's letters requesting an extension of time to pay its installments, dated April 9, 2002 and November 19, 2002, are DENIED.

IT IS FURTHER ORDERED that this letter shall be sent to the Pan American Interactive Corporation and its representatives by certified mail, return receipt requested.

This action is taken pursuant to Sections 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), under authority delegated pursuant to Section 0.331 of the Commission's rules.³⁵

Sincerely,

Margaret W. Wiener
Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

Rcd 3230, 3235, ¶ 8 (1997) (holding that the failure of a third party to perform its contractual obligation does not constitute a special circumstance justifying a waiver of the down payment default rule).

³⁵ 47 C.F.R. § 0.331.